

E-FILED on 5/23/08

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

UNITED STATES OF AMERICA,  
Respondent/Plaintiff,

v.

CLIFFINA JOHNSON and FREDERICK L.  
SHIRLEY,

Movants/Defendants.

No. C-04-03340-RMW  
No. C-06-06276-RMW

Related to CR-99-20092-RMW

ORDERS RE MOTIONS UNDER 28 U.S.C. §  
2255

Movants/defendants Cliffina Johnson and Frederick Shirley seek summary judgment on their motions under 28 U.S.C. § 2255 to vacate their convictions for conspiracy to bribe a public official and bribery of a public official. The United States has cross-moved to dismiss for lack of jurisdiction and failure to state a claim for relief. The motions have been extensively briefed and orally argued. The court hereby denies the motions.

**I. PROCEDURAL HISTORY**

On June 9, 1999 Johnson and Shirley were indicted for conspiracy to bribe a public official (18 U.S.C. § 371) and bribery of a public official (18 U.S.C. § 201(b)(1)(C)) during the period between March and July of 1998. Guilty verdicts were rendered against both defendants on October 2, 2000 following a jury trial. Shirley was sentenced on January 16, 2001 to incarceration for a term

1 of 14 months to be followed by three years of supervised release. Johnson was sentenced on January  
2 21, 2001 and received an identical sentence. Both defendants filed notices of appeal. Johnson's  
3 conviction was affirmed on May 10, 2002 (*U.S. v. Johnson*, 34 Fed. Appx. 381 (9th Cir. 2002)).  
4 Shirley apparently withdrew his appeal.

5 The primary witness against the defendants was Clarence Walker, then a revenue agent with  
6 the IRS, who testified with respect to the defendants' activities leading up to Shirley's actual  
7 payment to him of a bribe. Walker was later discovered to have been involved in separate criminal  
8 conduct and he was indicted and convicted of some of the charges against him. Shirley and Johnson  
9 contend that if they had been able to cross-examine Walker about this criminal activity at their trial  
10 they would have been able to cast substantial doubt about his credibility. The Government's alleged  
11 failure to provide the defense with information about Walker's criminal conduct is the basis of the  
12 movants' motions to set aside their convictions and sentences.

13 An investigation of Walker for suspected criminal conduct was commenced on June 27, 2001  
14 based upon information received on June 25, 2001. As a result of the investigation, Walker was  
15 indicted on January 24, 2004 for: (1) conspiring from about September 18, 2000 through about  
16 March 25, 2002 to aid another to evade currency transaction reporting requirements (18 U.S.C. §  
17 371); (2) causing a domestic financial institution to fail to file currency transaction reports (31  
18 U.S.C. §§ 5324(a)(1) and (d)(1)); (3) structuring a transaction so a domestic financial institution  
19 could evade reporting requirements (31 U.S.C. §§ 5324(a)(3)); and (4) bribery (18 U.S.C. §  
20 201(b)(2)(B) & (C)). Walker was convicted of the first two counts but the jury did not reach a  
21 verdict on Counts (3) and (4).

22 Johnson apparently learned of Walker's indictment on June 26, 2004. Shirley claims he did  
23 not learn of Walker's indictment until October 11, 2005. However, the Government contends that  
24 Shirley was advised of the indictment through his counsel in April 2004.

## 25 II. MOVANTS' CLAIMS AND DEFENSES THERETO

26 Shirley and Johnson assert the same two claims, specifically: (1) that there was a violation of  
27 due process resulting from the failure of the Government to disclose materially impeaching evidence  
28 about Walker; and (2) that there was a violation of due process by the Government's failure to

1 correct Walker's perjurious statements and material omissions during his testimony. The  
2 Government responds and seeks to dismiss Shirley and Johnson's motions based on essentially four  
3 defenses: (1) Shirley's claim is barred as untimely; (2) Shirley's claim is based upon derivative  
4 entrapment which is not a cognizable defense; (3) Johnson has no claim because she is no longer  
5 under a criminal sentence; and (4) the Government has no obligation to produce *Brady/Giglio*  
6 information which it did not possess and of which it was unaware during Shirley and Johnson's trial.  
7 The Government also contends the evidence pertaining to Walker's acts of misconduct was not  
8 material to movants' convictions.

### 9 III. ANALYSIS

#### 10 A. Timeliness of Shirley's Claim

11 The Government contends that Shirley's claims are untimely because they were not filed  
12 within one year after the facts supporting the claims could have been discovered through the  
13 exercise of due diligence. Walker was indicted on June 26, 2004 and Shirley did not file his motion  
14 until October 11, 2006. Under 28 U.S.C. § 2255(4) a motion to set aside a conviction must be filed  
15 within one year of "the date on which the facts supporting the claim or claims presented could have  
16 been discovered through the exercise of due diligence." The Government prosecutor claims he  
17 spoke with Shirley's trial attorney in early 2005 and told him about Walker's indictment. The  
18 Government also claims that Walker's indictment received significant publicity and that Shirley's co-  
19 defendant Johnson learned of the indictment from that publicity implying that Shirley should have  
20 also.

21 Shirley claims that he first learned of Walker's indictment when he contacted the Federal  
22 Public Defender's Office in the second week of October 2005 to inquire about getting time off his  
23 supervised release term. Shirley completed his federal sentence in March 2004 but then had to serve  
24 a state sentence for a parole violation. Shirley was released from state custody approximately  
25 September 21, 2005. Shirley declares that his only contact with his federal trial attorney after he  
26 was sentenced concerned an issue of whether or not he had fully served his federal sentence. He  
27 contacted his attorney through his wife and did not speak with him directly. He had no retainer  
28 agreement with his attorney at this time and learned nothing about Walker's indictment.

1 Shirley's trial attorney declares that he never talked to the Government about Walker's  
2 indictment. He also states that his representation of Shirley in the subject federal case ended upon  
3 Shirley's being sentenced in the case. His only other involvement in the federal matter was a phone  
4 call to the Government he made as a courtesy to his former client to see if his federal sentence had  
5 been correctly calculated or could be shortened by one day.

6 The court concludes that Shirley cannot be said to have failed to use due diligence in  
7 discovering the basis for his section 2255 motion because he had no reason to suspect that Walker  
8 would be or had been indicted. Shirley was incarcerated at the time the indictment was returned  
9 and, therefore, did not have the access to news that he might otherwise have heard. Even if his trial  
10 attorney was informed of Walker's indictment, there is no evidence this information was passed on  
11 to Shirley and, since that attorney no longer represented Shirley, the attorney's knowledge cannot be  
12 attributed to Shirley.

### 13 **B. Shirley's Claim Is Not Based upon Derivative Entrapment**

14 The Government contends that Shirley's motion is predicated on the theory that Shirley was  
15 entrapped by other than a Government agent, specifically by Johnson. In other words, Shirley is  
16 now asserting a claim of derivative entrapment which is not a defense. *United States v. Thickstun*,  
17 110 F.3d 1394, 1399 (9th Cir. 1997). "Derivative entrapment occurs when an entrapped individual  
18 induces the defendant to commit a crime." *Id.* However, Shirley is not claiming that he was  
19 entrapped by Johnson but that he was entrapped by Walker. The entrapment was accomplished,  
20 according to Shirley, by Walker's threats of dire and untrue consequences that would befall to  
21 Shirley if he did not agree to bribe Walker. The contention that Walker allegedly used Johnson as a  
22 conduit to deliver inducing information to Shirley does not make the case one of derivative  
23 entrapment. If the evidence supports Shirley's theory that he was unlawfully induced by Walker,  
24 Shirley is correct that the Government's conduct constituted entrapment and not derivative  
25 entrapment.

### 26 **C. Johnson Has Standing to Assert Her Claim**

27 The Government argues that the court lacks jurisdiction to grant relief to Johnson because  
28 she is no longer in custody. The Government relies upon the language in section 2255 which

1 provides for potential relief only to "[a] prisoner in custody under sentence of a court" (28 U.S.C. §  
2 2255) and *United States v. Kwan*, 407 F.3d 1005, 1009 (9th Cir. 2005)(motion under § 2255 may  
3 only be filed by person in government custody). There is no question but that a prisoner must be  
4 under the restraint of a sentence in order to file a section 2255 motion. But what the Government  
5 overlooks is that the custody requirement is determined as of the date of filing. In *Carafas v.*  
6 *Lavalee*, the Supreme Court held that once jurisdiction has attached in the district court "it is not  
7 defeated by the release of the petitioner prior to completion of the proceedings on such application."  
8 391 U.S. 234, 237 (1998); *see United States v. Bryson*, 981 F.2d 720, 726 (4th Cir.1992); *see also*  
9 *United States v. Hearst*, 638 F.2d 1190 (9th Cir. 1980).

10 Johnson filed her motion on August 16, 2004 when she was still serving her sentence.  
11 Therefore, her motion was timely. Further, she is still suffering collateral consequences of her  
12 conviction such as the inability to vote.

#### 13 **D. The Government's *Brady/Giglio* Obligation Is Continuing**

14 The Government contends that it had no duty to turn over information concerning Walker's  
15 wrongdoing because it did not learn of any of that information until June 25, 2001 at the earliest.  
16 Johnson and Shirley had been sentenced in January 2001. Therefore, the information was not  
17 available for use at either the trial or sentencing. *See Sanchez v. United States*, 50 F.3d 1448, 1453  
18 (9th Cir. 1995) ("[W]e find that the government was not aware of the alleged *Brady* material. The  
19 Government has no obligation to produce information which it does not possess or of which it is  
20 unaware."). Johnson and Shirley respond by contending that the information that Walker knew  
21 should be imputed to the Government. If not, in the alternative, the Government at least had an  
22 obligation to turn over the information when it first learned of it so that it could have been used in a  
23 motion for a new trial.

24 Johnson and Shirley claim that Walker should be considered part of the prosecution thus  
25 obligating the Government to turn over to the defense information concerning Walker's criminal  
26 activities and lies during trial. The defense's argument is predicated upon the fact that Walker was  
27 part of the prosecution team because he worked for the agency investigating Shirley and he was a  
28 key member of the prosecution. Although Walker was a critical witness for the Government, the

1 court finds that he was not part of the prosecution for *Brady* purposes. Walker was not a law  
2 enforcement officer, nor was he responsible for making prosecutorial decisions with respect to  
3 Johnson and Shirley. The court has found no case suggesting that a *Brady* obligation arises when a  
4 cooperating Government witness, who was employed by the Government, lies without the  
5 knowledge of those prosecuting the case. *See Sanchez*, 50 F.3d at 1453. Therefore, the court finds  
6 Walker's knowledge cannot be imputed to the Government thus triggering a *Brady* obligation.

7 Johnson and Shirley's contention, however, that the Government had an obligation to turn  
8 over the information it learned about Walker's criminal wrongdoing at the time it first learned about  
9 that wrongdoing has merit. In *Thomas v. Goldsmith*, 979 F.2d 746 (9th Cir. 1992) the court held that  
10 a *Brady* obligation continues through post-trial proceedings. At the time that the Government  
11 learned of Walker's wrongdoing and lies, the information could have been used by the defense to  
12 support a new trial motion under Fed. R. Crim. P. 33. At that time, the defense still had ample time  
13 to make a motion for new trial within the three-year limitation period. *See* Fed. R. Crim. P. 33(b)(1).

14 The Government correctly points out that in *Thomas*, the court only held that the continuing  
15 duty to disclose applied in a post-trial habeas corpus proceeding and argues that *Thomas* should not  
16 be read to suggest a blanket post-conviction obligation to disclose. The Government further points  
17 out that the information here was provided before the section 2255 motions were filed. The  
18 Government's argument, however, overlooks the fact that at the time the information was learned by  
19 the Government, Shirley and Johnson could have made timely motions for a new trial. Therefore,  
20 the court finds that the Government had an obligation to inform Johnson and Shirley of the  
21 information it learned about Walker's alleged wrongful conduct and lies when it first learned the  
22 information so Johnson and Shirley could have used that information as a basis for a motion for new  
23 trial.

## 24 **E. Materiality of the Failure to Disclose**

### 25 **1. Definition and Test of Materiality**

26 The critical question is whether the failure to disclose the information about Walker was  
27 material. "[E]vidence impeaching the credibility of a key government witness, as well as  
28 exculpatory to defense, falls under the *Brady* doctrine." *United States v. Shaffer*, 789 F.2d 682, 687

(9th Cir.1986). Failure to disclose information, however, only constitutes a *Brady* violation if the requested information is "material," that is, the evidence undermines confidence in the outcome of the trial. *United States v. Bagley*, 473 U.S. 667, 678 (1985).

## **2. Lack of Materiality of Impeachment Evidence As to Case Against Defendant Shirley**

The Government asserts the failure to disclose the impeaching evidence concerning Walker was not material because tape-recorded evidence left no question as to Shirley's guilt. Shirley relied at trial solely upon an entrapment defense.<sup>1</sup> The evidence was undisputed that on April 28, 1998 Shirley paid \$1,000 as an initial payment on a bribe to Walker to create phony IRS tax audit records clearing Shirley of his failure to file income tax returns for the years 1987-1996. A videotape showed Shirley paying \$6,000 in \$100 bills on May 21, 1998 as additional payment of the bribe. Shirley did not testify at trial nor has he filed any declaration in these proceedings claiming he was entrapped. Therefore, the question is whether the defendant Shirley's inability to test Walker's credibility by cross-examining Walker about his criminal conduct undermines confidence in Shirley's conviction. Does it raise any reasonable likelihood that the jury was wrong in finding that Shirley was either pre-disposed to commit the crime of bribery or at least was not induced by government agents to do so?

The evidence about Walker is disturbing, particularly since the Government portrayed him as an ethical IRS Revenue Agent. However, a review of the undisputed evidence leaves no reasonable doubt as to Shirley's guilt and that the inability to challenge Walker's credibility based upon the new evidence was harmless. The critical conversations Walker had with Shirley were recorded.

On March 27, 1998 Walker and Shirley met for the first time. Walker, Shirley and Johnson met at the Coleman Still restaurant (or according to Johnson the meeting was at the Cozy Inn) where Walker explained to Shirley what the tax notice he had received from the IRS meant, told Shirley that he faced serious allegations, warned Shirley of potential adverse consequences and advised that the IRS agent involved was very thorough. Shirley expressed his dislike of the IRS agent and his

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<sup>1</sup>If evidence of entrapment is offered, the burden is on the Government to prove beyond a reasonable doubt that the defendant was not entrapped.

1 frustration with the IRS and his problem.

2 At trial Johnson testified about specific statements that were on the tape of this March 27  
3 meeting.

4 Q And the three of you are having lunch?

5 A Yes.

6 Q And Fred is talking?

7 A Yes.

8 Q And you're participating in the conversation; isn't that right?

9 A Yes.

10 Q Okay. And this meeting—this is the first time that Clarence had met  
11 Fred Shirley, as best you know; isn't that right?

12 A Yes.

13 Q Okay. Because you had introduced them; right?

14 A Yes, I did.

15 Q All right. Now, at the very bottom of that page then, Fred Shirley  
16 says, "I.R.S., I don't want any, this is just, that's all. If I can help you  
17 with a car, I'll be more than happy. It has nothing to do with you or  
18 anything else. Two Americans talking to each other. Your badge is  
19 off right now."

20 Do you see that?

21 A Yes, I do.

22 Q Fred Shirley said that, didn't he?

23 A Yes, he did.

24 Q And when he meant "your badge is off right now," that indicated that  
25 something about, that they were trying to hide something; isn't that  
26 right?

27 A Yes.

28 Q And, again, you introduced Fred Shirley; right?

A Yes.

Q And you— here we have a conversation about a car for some help;  
isn't that right?

A Yes.

1 Q And there's no doubt in your mind, and tell these ladies and  
2 gentlemen, that that help that Fred Shirley was looking for was to help  
him with his audit; isn't that right?

3 A Yes.

4 Q Okay. So while there may have been discussions about a Form 2807,  
5 there was also discussions about helping him with his audit; isn't that  
right?

6 A Yes.

7 Q And at that time when you hear that, you had no doubt in your mind  
8 that it was about helping him with his taxes; isn't that right?

9 A Yes.

10 Q And you knew that the person auditing his taxes was Dan Sutherland;  
isn't that right?

11 A Yes, I did.

12 Q And what they were asking Clarence was that he should take over the  
13 file and fix his taxes; isn't that right?

14 A No.

15 Q No?

16 A No.

17 Q Okay. But you knew at the very least here that a car was being offered  
to Clarence; isn't that right?

18 A Yes, it is.

19 Trial transcript at 1267-68 ("Tr. at \_\_\_\_"). Walker made no suggestion at the meeting that he would  
20 fix Shirley's taxes or in any way solicit a bribe or intimate that a bribe should be offered to him.

21 Walker and Johnson testified to different versions of what happened between the March 27,  
22 1998 meeting and April 28, 1998, when the parties met at the Coleman Still. During this interim  
23 period Johnson claims that Walker informed her that he was going to solicit a bribe from Shirley and  
24 then insisted that she assist him in doing so. She claimed that these discussions with her apparently  
25 were not recorded and that Walker said he was going to charge Shirley \$10,000. Walker, on the  
26 other hand, claimed that Johnson had suggested to him in early April that Shirley would pay a  
27 \$10,000 bribe.

28 Walker's next direct communication with Shirley took place on April 28, 1998 at the

1 Coleman Still restaurant. Before Johnson arrived, Shirley specifically raised the question of  
2 Walker's doing something for him.

3 FS (Fred Shirley): I'm trying to do the best I can and be honorable about  
4 it but he's an asshole, pardon my French. I told Tippy what I . . .  
5 this is hard. It's hard to approach it how the hell you help me this  
6 thing . . . .

7 4/28/98 Recorded conversation at 3 ("\_\_\_\_ Rc. at \_\_\_\_"). Shirley shortly thereafter specifically  
8 raises the idea of the payment of money.

9 FS: Yeah. Now, if there's anything you can do for me . . . here's what I  
10 was thinking. Let's say that I could come up with some money. I  
11 don't wanna give it to the IRS.

12 CW (Clarence Walker): Okay.

13 FS: Okay? I'd rather give it to you for something you can do for me. I  
14 don't know what you can do. I don't know how you can do anything. I  
15 don't know.

16 CW: Well what do you want me to do for you?

17 FS: Well what can you do for me? Is there anything you can do for me?

18 CW: Well, you know more about your situ . . . I don't know anything about  
19 it. I—

20 FS: I haven't really finished my situation yet, I guess. They're still in the  
21 middle of auditing and—

22 CW: Okay, you said som'em about not giving the money to the IRS, you'd  
23 give it to me.

24 FS: Well yeah. If you can do something for me, I'd rather give it to you  
25 than give it to the IRS, it's gonna be lost in the stream somewhere.

26 CW: I could get the file, that's . . . that can happen.

27 *Id.* at 13-14. Discussion concerning Walker's ability to get Shirley's file followed and then Cliffina  
28 Johnson arrived and the conversation continued.

29 CW: Cause, uh, gettin' the file . . . damn . . . no problem in getting the file.  
30 I'm just, like I was telling Cliff, "I'm not quite sure what Fred wants  
31 me to do."

32 FS: Here's what I was saying, Cliff, basically, is, you know, I can go out  
33 and borrow 10 or 20 grand, that, okay? To help clear up this mess.

34 CJ (Cliffina Johnson): Mm-hmm.

35 FS: I just don't wanna throw it to the IRS, I'd rather give it to—

1 CJ: Do what you gotta do.

2 FS: Just some help here. I don't wanna . . . if I turn it over to them it's just

3 gonna be swallowed up in the stream. If he can get, maybe he'll

4 inherit my file. I don't know. . . I already told Mike, Mr. Jenkins. I

5 don't like Dan.

6 CJ: Mm-hmm.

7 FS: Uh, I can't deal with him. I mean, he's really puttin' me down all the

8 time and, you, raggin' on me.

9 CW: Well the file could get transferred.

10 FS: That's what I mean.

11 CW: Yeah.

12 FS: The file could get transferred.

13 CW: Like I was telling Cliff yesterday, there's only two agents in the group

14 that has a low inventory, and that's me and this other little girl. Now

15 Dan's gonna be going. She's leaving Monday—next Monday on some

16 training, okay, so that just leaves me. Now don't worry about all the

17 particulars on how to get the file or anything like that. I'm just trying

18 to figure out once I get the file, what do you want me to do with it.

19 *Id.* at 16. Discussion then continued as to what Shirley's tax problem was and what Walker could

20 do:

21 CW: Okay. Now, once I get the file, uh, I'm not sure you . . . exactly—

22 FS: Well I know you can't flush it down the toilet. (Laughs) I mean—

23 \* \* \*

24 FS: But there's something that I can—how do I negotiate out of the deal

25 with the IRS?—that's the next step. I can go borrow some money

26 (unintelligible) and I can say, okay, I'm gonna correct this, start over

27 new and pay what I can pay; I mean, since it's all gonna be—

28 CW: Well, you said you didn't wanna pay the IRS, you put down a dollar

sign there.

FS: Well I don't want to but I'm gonna have to, obviously, pay something,

all right, Clarence, to make it—

CW: You said you'd rather pay me.

FS: I'd rather, yes. Of course I would.

CW: Well,—

FS: (Unintelligible) absolutely. (Laughs).

1 CJ: I (Unintelligible), don't ask no questions.  
 2 FS: Don't ask any questions.  
 3 CW: So.—  
 4 CJ: 'Cause he knows what he's doin'.  
 5 FS: Okay.  
 6 \* \* \*  
 7 CW: All right. So, you are willing to pay me is what you're sayin'?  
 8 FS: Yes.  
 9 CW: To do what?  
 10 FS: Well, actually, at this point, I really don't know, Clarence, I just wanna  
 11 get out of the loop somehow—I . . . I don't really know. I'm 60 years  
 12 old and I just wanna get . . . it's just too much 'cause I got a bad heart.  
 13 CW: Oh, you know. You just—  
 14 FS: Well how do I get . . . how do I get out of the loop? How do I get out  
 15 of this damn thing? You got the file that say I owe seventy grand  
 16 (unintelligible). They came up with some figure I owe seventy  
 17 thousand.  
 18 CW: Like I said, the particulars you don't need to worry about.  
 19 \* \* \*  
 20 CW: Okay? You said you'd rather pay me, than pay the IRS.  
 21 FS: That's right.  
 22 CW: Okay. So, what exactly. . . what do you mean when you say pay me  
 23 rather than the IRS? (Phone ringing)  
 24 FS: (Laughs) Okay.  
 25 CJ: How much are you talking' about, are you considering?  
 26 \* \* \*  
 27 FS: Uh, so I can do 10 now and probably 10 later, and that's about all I can  
 28 get. Honestly.  
 CW: Okay. Do you . . . well are you gonna pay me ten thousand dollars  
 now is what you're sayin'?  
 FS: No, not today, but I mean, as soon as we get this solved and  
 CW: Oh.

1 FS: Then ten later—

2 CW: Well okay.

3 FS: 'Cause I can probably get 10 in another forty-five days.

4 CW: Okay. Okay.

5 *Id.* at 21. Walker and Shirley then discussed the payment further and Walker confirmed the payment  
6 was for him.

7 CW: Now is this for me?

8 FS: That's for you.

9 CW: What about—

10 FS: She gets—

11 CJ: That car?

12 FS: She has to get a car . . . she gets a car down the road, I guess,  
somewhere.

13 *Id.* at 28. The parties then discuss what Walker will do and when the actual payment of the bribe  
14 will be made. Shirley then concludes the discussion by offering Walker a free vacation in Hawaii.

15 FS: When this is all said and done I am gonna send you to Hawaii, you  
16 gotta go to spend some time in Hawaii for a week in my friend's condo  
over there. Take the bird and fly over, you and your wife.

17 CW: Shoot, I can't afford a ticket to Hawaii.

18 FS: Zero.

19 CW: Huh?

20 FS: Gratis. A friend of mine. No problem.

21 CW: Oh, really?

22 FS: Absolutely.

23 CW: How are you gonna arrange that?

24 FS: Are you kidding? I'm a Hawaii (unintelligible). I can arrange  
25 anything over there, it's my homeland. I call up and say, "Let a friend  
of mine come into your condo," no problem.

26 CW: No, but I mean, the airfare and all that.

27 FS: Handled. Senior vice-president of Brazilian Airlines is one of my best  
28 friends from high school and college. He just trades out a few tickets  
to Hawaiian Air, too. Fly Hawaiian Air.

1 CW: Oh, really?

2 FS: Of course.

3 CW: See, I don't know nothin' about that stuff.

4 FS: Just loving people and knowing each other. Now that's som'en I gotta  
5 throw in for you. I want you to have a week to Hawaii.

6 CW: Okay.

7 *Id.* at 74.

8 These recorded conversations strongly support the conclusion that Shirley initiated the idea  
9 of bribing Walker to get rid of his, Shirley's, tax problem. The conversation about a car on March  
10 27, 1998 took place before Johnson even claims that Walker spoke to her about asking for a bribe  
11 from Shirley. Nevertheless, in their motions both Shirley and Johnson contend that Walker came up  
12 with the bribe idea and then pressured Johnson to suggest the idea to Shirley. It is difficult to read  
13 the above excerpts and accept that contention. However, more importantly, the contention does not  
14 square with Johnson's trial testimony. Johnson did testify that the idea of a cash payment was  
15 Walker's and that Walker got her to agree to persuade Shirley to pay a \$10,000 bribe. She testified  
16 that Walker first mentioned in late March that he was going to charge Shirley but Walker had  
17 laughed when he said it so she did not take him seriously. Tr. at 1213:1-13. Thereafter, Walker  
18 mentioned to her on April 2 and 9 that he was going to charge Shirley but he again laughed when he  
19 said so. However, on April 14 at a chance meeting between Walker and Johnson, Johnson testified  
20 that Walker told her he was serious. *Id.* at 1213:15-1217:11. Johnson claims that Walker thereafter  
21 pressured her into agreeing to ask Shirley to pay Walker a fee. Both movants cite page 1230 of the  
22 trial transcript as supporting the claim that Johnson then conveyed Walker's fee to Shirley.  
23 Johnson's testimony, however, does not support that claim. When asked at trial about a statement  
24 she made in a recorded conversation with Walker on April 27, she testified:

25 Q When you say, "but I'll ask him, though, before you get there, I'll ask  
26 him," what are you saying there?

A I'll ask him how much he wants to pay Clarence.

27 Q Okay, and why did you agree to do that?

28 A Because I was pressured.

1 *Id.* at 1230:3-9. However, Johnson expressly denied that after agreeing to ask Shirley she did so.

2 Q And how long did the 14th encounter take?

3 A Just a couple of minutes.

4 Q And then the meeting with—the next meeting with Mr. Shirley happens on the 28th; right?

5 A Yes.

6 Q Okay. Now between the 14th of April and the 28th when you had the meeting, of April, did you call Fred Shirley?

7 A If I recall, once or twice just to confirm that we going to be meeting on the 28th. That's about all. But that's it.

8 Q Did you tell him what Clarence Walker had told you on the 2nd or on the 9th or on the 14th?

9 A No. I couldn't. I couldn't do it. I couldn't tell Fred that.

10 Q What did you tell Fred?

11 A I didn't tell Fred nothing. I just told him to meet us there on the 28th. I couldn't tell him.

12 *Id.* at 1217:10-1218:2. Therefore, even if Walker had told Johnson that he was going to ask for a  
13 bribe, there is no evidence that Shirley was told that Walker was going to ask for a bribe prior to  
14 Shirley's suggesting he would pay one both before and after Johnson joined them in his meeting on  
15 April 28 with Walker at the Coleman Still restaurant.

16 Shirley also argues that Walker's advice to Shirley as to the dire consequences he faced as a  
17 result of his tax problem induced Shirley to pay a bribe. However, accepting for discussion that  
18 Johnson had asked Walker to meet with Shirley only for the purpose of explaining the notice that  
19 Shirley had received from the IRS, it appears that Shirley clearly had a severe tax problem and that  
20 what Walker told him was, at least in large part, true. Shirley has not offered evidence that Walker's  
21 advice was materially wrong and thus wrongfully induced Shirley to offer a bribe.

22 The court concludes that the fact that the potentially impeaching evidence concerning  
23 Walker was not available to Shirley at his trial does not undermine confidence in the correctness of  
24 the jury's verdict finding him guilty.

1                   **3.       Lack of Materiality of Impeachment Evidence As to Case Against**  
2                   **Defendant Johnson**

3               Johnson was entrapped if she was not predisposed to commit the crimes of which she was  
4 convicted before being contacted by Walker and if she was induced by Walker to commit those  
5 crimes. The jury necessarily found that the Government proved beyond a reasonable doubt that she  
6 was not entrapped. The question now is whether there is a reasonable probability that, had the  
7 newly discovered impeaching evidence of Walker's criminal acts been disclosed, the result of the  
8 trial against Johnson would have been different. Having carefully reviewed the evidence, the court  
9 concludes that it would not have been.

10             The only evidence of inducement was Johnson's testimony that Walker came up with the  
11 plan to charge Shirley and that Walker then pressured Johnson into agreeing to ask Shirley how  
12 much he would pay. "Inducement is any government conduct creating a substantial risk that an  
13 otherwise law-abiding citizen would commit an offense." *United States v. Sandoval-Mendoza*, 472  
14 F.3d 645, 648 (9th Cir. 2006)(internal quotations omitted). The mere suggestion to commit a crime,  
15 however, does not amount to inducement. *United States v. Mendoza-Prado*, 314 F.3d 1099, 1102  
16 (9th Cir. 2002). Here, although Johnson claims she was pressured into participating, the  
17 circumstances make that claim difficult to accept. Although persuasion by itself can result in  
18 entrapment (*see United States v. Gurolla*, 333 F3d 944, 954 (9th Cir. 2003)), the evidence shows no  
19 sound basis for concluding that Walker's alleged pressure would have created a substantial risk that  
20 an otherwise law-abiding citizen would have committed the offenses. Johnson had been offered no  
21 money or other benefit for her participation at the time she claims to have yielded to Walker's  
22 pressure. Walker had made no threats nor taken any coercive action against Johnson. The evidence  
23 provides no rational explanation why a law-abiding citizen, even assuming the facts as claimed by  
24 Johnson, would have felt pressured to participate in a bribery scheme.

25             Johnson's claim that she participated because of Walker's pressure, and that she was not  
26 predisposed to commit the crimes, is inconsistent with the evidence.

27             In evaluating predisposition, we consider five factors: (1) the defendant's character  
28 and reputation; (2) whether the government initially suggested criminal activity; (3)  
whether the defendant engaged in the activity for profit; (4) whether the defendant  
showed any reluctance; and (5) the nature of the government's inducement. Although

1 none of these five factors controls, the most important is the defendant's reluctance to  
2 engage in criminal activity.

3 *United States v. Tucker*, 133 F.3d 1208, 1217 (9th Cir. 1998) (internal quotation marks and citations  
4 omitted). The nature of the alleged inducement of Johnson, if any, and Johnson's apparent lack of  
5 reluctance are shown by the evidence previously discussed. Two additional pieces of evidence  
6 relating to Johnson's character show that she had a willingness to do illegal acts for money. On  
7 March 18, 1998, a date before Johnson claims that Walker said anything about seeking a bribe,  
8 Johnson told Walker about charging for helping a tax payer with an offer-in-compromise.

9 CW: Oh is that that uh, what do you call that thing, uh . . .

10 CJ: Offer in Compromise?

11 CW: Yeah.

12 CJ: (Unintelligible).

13 CW: Oh he's . . .

14 CJ: Tha's is all he wanted.

15 CW: Did you, what, did you get him one?

16 CJ: Yes (Unintelligible) already did it.

17 CW: It went through?

18 CJ: Uh huh. He didn't have much. I didn't have nothing to do with that.  
19 That the RO's Job.

20 CW: Oh. The RO did it for you?

21 CJ: I gave him the form, the Offer in Compromise form?

22 CW: Yeah.

23 CJ: I brought it down there to him. And explained how to fill it out.

24 (Unintelligible)

25 CW: Charged you how much?

26 CJ: I only charged him a hundred twenty-five dollars.

27 CW: Oh you charged him?

28 CJ: Uh huh, you know damn well I did. You think I do it for free?

1 3/18/98 Rec. at 15-16.<sup>2</sup> Then on April 27, 1998 in a meeting between Johnson and Walker, Johnson  
2 expressed her determination to personally get some of the money from Shirley.

3 CW: He's got to tell me what he wants done, cause uh, I'm not going to  
4 volunteer anything for him. No . . . (Unintelligible) got to be the one  
shit get off the pot.

5 CJ: Um hmmm.

6 CW: You know, you tell him one thing, and uh, and he asked me to do  
something different, and then it don't turn out.

7 CJ: Um mmmm. No . . . I wouldn't do that, I wouldn't go that way. I  
8 wouldn't go that way. I want the bastard's money.

9 CW: Huh?

10 CJ: I want his money. I want his money.

11 CW: You want his money?

12 CJ: Um hmmm.

13 4/17/98 Rec. at 13.

14 If Johnson is believed, Walker made the initial suggestion of a cash payment for fixing  
15 Shirley's tax problem. Nevertheless, it was Johnson who arranged the original contact between  
16 Shirley and Walker. Johnson brought Shirley into contact with Walker because Shirley had a tax  
17 problem. Before Johnson claims that Walker pressured her to assist him in getting a bribe from  
18 Shirley, she had told Walker in a March 18, 1998 conversation that Shirley would give Walker a car  
19 in exchange for his help.

20 C J: . . . He said well hell Cliff if he could just help me out I'll give him  
21 the car. I said you didn't give me one yet. He said no if he can help me out  
22 I'll give him a car. I said (Unintelligible), come on now. He said no this  
man's on my ass I want to get him off my ass, that's all.

23 CW: You talking about, Dan?

24 CJ: Yeah. Just let me talk with him that's all, cause he (Unintelligible).

25 CW: Well like, see I don't, I don't know what exactly Fred will want me to  
26 do . . .


27  
28 <sup>2</sup>Johnson testified at trial that she did not actually charge for offers in compromise and that her  
statement to Walker was a lie.

1 3/18/98 Rec. at 19-20. The evidence that Johnson was induced to commit her crimes and was not  
2 predisposed to engage in the criminal activity is minimal at best. The weight of the evidence  
3 strongly suggests that Johnson was not reluctant to engage in criminal activity. The newly  
4 discovered potentially impeaching evidence of Walker, although disturbing, does not undermine the  
5 court's confidence in the correctness of Johnson's conviction.

6 **III. ORDER**

7 The motions of Johnson and Shirley for relief under 28 U.S.C. § 2255 are denied.

8  
9 Dated: 5/23/08

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11   
12 RONALD M. WHYTE  
13 United States District Judge  
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1 **Copy of Order mailed on** 5/27/08 **to:**

2 Cliffina Johnson  
3 745 Dutton Ave.  
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4 **Notice of this document has been electronically sent to:**

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6 Lupe Martinez martinez-luna@sbcglobal.net

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11  
12  
13 Counsel are responsible for distributing copies of this document to co-counsel that have not  
14 registered for e-filing under the court's CM/ECF program.  
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